IN THE

Supreme Court of the United States

October Term, 1946

No. 1363

ORSEL McGHEE and MINNIE S. McGHEE, his wife, *Petitioners*,

v.

BENJAMIN J. SIPES and ANNA C. SIPES; JAMES A. COON and ADDIE A. COON, *et al.*, *Respondents*.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Michigan affirming a final judgment for respondents and plaintiffs in the original suit in the Circuit Court of the County of Wayne in chancery.

A

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344 (b)).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Michigan on the 7th of January, 1947, (R. 87) and petitioners' motion for a rehearing was denied on the 3rd of March, 1947 (R. 118). The opinion of the Supreme Court of Michigan is reported at 316 Mich. 614, and is also filed as part of the record (R. 87).

B

Summary Statement of the Matter Involved

1. Suit and the parties thereto.

This proceeding originated as a suit in equity in the Circuit Court for the County of Wayne, in chancery, in the State of Michigan against the petitioners for the purpose of obtaining an injunction restraining the petitioners from using or occupying property which had been purchased by them and which they were occupying as their home (R. 16).

Petitioners were found by lower court to be Negroes (R. 74). Prior to the present suit, they purchased and became the occupants of an improved parcel of residential property in the City of Detroit, County of Wayne, State of Michigan, more fully described as 4626 Seebaldt Avenue (R. 16, 19). Petitioners are the owners of record title to the property in fee simple and occupied it as their home

(R. 19). In this action, the respondents sought and obtained a decree requiring the petitioners to move from said property and thereafter restraining them from using or occupying the premises and, further, restraining petitioners from violating a race restrictive covenant upon such land, set forth more fully below (R. 74, 75).

2. Theory and factual basis of the suit.

The essential facts are undisputed. On or about the 20th day of June, 1934, John C. Ferguson and his wife, the then owners of the premises now occupied by petitioners, 4626 Seebaldt Avenue, executed a certain agreement providing in its essential parts as follows:

> "We, the undersigned owners of the following described property:
>
> Lot No. 52 Seebaldts Sub. of Part of Joseph Tireman's Est. 1/4 Sec. 51 & 52 10 000 A T and Fr'l Sec. 3, T 2 S, R 11 E.
>
> for the purpose of defining, recording, and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described, to remain in force until January 1st, 1960—to run with the land, and to be binding on our heirs, executors, and assigns:
>
> 'This property shall not be used or occupied by any person or persons except those of the Caucasian race'
>
> "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subje ed to this or a similar restriction" (R. 63).

This contract was subsequently recorded at Liber 4505, page 610, of the Register of the County of Wayne on the 7th day of September, 1935. Similar agreements were executed on forty-nine lots of property located within the subdivision within which the lot which is the subject of this suit is located (R. 55, 56). Petitioners purchased said property on the 30th of November, 1944 from persons holding under the said Fergusons, who executed the restriction. Bill of Complaint herein was filed on the 30th of January, 1945.

C

Questions Presented

I

Whether judicial enforcement of a restriction against the use of land by Negroes constitutes a violation of the Fourteenth Amendment.

II

Whether agreements restricting the use of land by members of racial or religious minorities is against the public policy of the United States.

The foregoing questions were seasonably and properly raised in the Wayne County Circuit Court and in the Supreme Court for the State of Michigan, and were considered and decided adversely to the petitioners herein in both of said courts. However, the opinion of the Supreme Court of Michigan was based upon *stare decisis*, and stated:

> "The unsettling effect of such a determination by this court without prior legislative action or a specific Federal mandate would be, in our judgment, improper (R. 96).

D

Reasons Relied on for Allowance of Writ

1. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and laws of the United States.

United States Constitution, Article IV, Sec. 2, Fifth Amendment, Fourteenth Amendment;

Ward v. *Maryland*, 12 Wall. 418;

The Slaughter House Cases, 16 Wall. 36;

Buchanan v. *Warley*, 245 U. S. 60.

(b) The State, through the courts below, has been the effective agent in depriving petitioners of their property, and the exercise of constitutionally protected rights therein.

(c) Action by a state, through its judiciary, prohibiting or impairing, on account of race or color, the right of a person to use, occupy and enjoy his property is violative of the constitutional guarantee of due process.

Ex parte Virginia, 100 U. S. 339;

Virginia v. *Rives*, 100 U. S. 313;

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226;

Raymond v. *Chicago Traction Co.*, 207 U. S. 20;

Mooney v. *Holohan*, 294 U. S. 103;

American Federation of Labor v. *Swing*, 312 U. S. 321.

(d) The agreement in its inception was subject to constitutional limitations upon the power of the courts to enforce it.

Norman v. *B. & O. R. Co.*, 294 U. S. 240;

Home Building & Loan Assoc. v. *Blaisdell*, 290 U. S. 398.

(e) The issue here presented has never been decided by this Court.

Corrigan v. *Buckley*, 271 U. S. 323;

Smith v. *Allwright*, 321 U. S. 649.

2. A restriction against the use of land by members of a racial minority is contrary to the public policy of the United States.

Constitution of the United States, Thirteenth, Fourteenth and Fifteenth Amendments;

The Slaughter House Cases, *supra*;

Strauder v. *West Virginia*, 100 U. S. 303;

Tunstall v. *Brotherhood of Firemen, etc.*, 323 U. S. 210;

Steele v. *Louisville & N. R. Co.*, 323 U. S. 192;

In re Drummond Wren, 4 D. L. R. 674;

United Nations Charter.
Preamble
Articles 55 and 56.

Sociologists, experts in city planning, crime prevention and race relations have established that limitations upon the use of land for living space by members of racial or religious minorities constitute one of the gravest dangers to democratic society which we face in America, and in the light of these dangers the courts must consider and weigh the effects of their use of the injunctive power to extend such limitations in the face of the resulting damage to the whole of society.

In support of the foregoing grounds of application, petitioners submit herewith the accompanying brief setting forth in detail the pertinent facts and argument applicable thereto.

Petitioners further state that this application is filed in good faith and not for purposes of delay.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan be granted.

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Opinion of Court Below

The opinion of the Supreme Court of the State of Michigan is reported at 316 Mich. 614.

Jurisdiction

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The judgment sought to be reviewed was entered by the Supreme Court of the State of Michigan on the 7th of January, 1947 (R. 87) and application for rehearing was denied on the 3rd of March, 1947 (R. 118).

Statement of the Case

The statement of the case and a statement of the salient facts from the record appear in the accompanying petition for certiorari.

Errors Below Relied Upon Here

I. The Judicial Arm of the Government has Imposed Racial Restrictions in Violation of the Constitution and Laws of the United States.

II. The Restriction Against the Use of Land by Minorities Involved in This Case was Held not to Be Contrary to Public Policy.

Summary of Argument

I. Judicial Enforcement of the Agreement in Question is Violative of the Constitution and Laws of the United States.

A. The Right of a Citizen to Occupy, Use and Enjoy His Property is Guaranteed by the Constitution and Laws of the United States.

B. The State, Through the Courts Below, Has Been The Effective Agent in Depriving Petitioners of Their Property, And The Exercise of Their Constitutionally Protected Rights Therein.

C. Action by a State, Through Its Judiciary, Prohibiting or Impairing, On Account of Race or Color, The Right of a Person to Use, Occupy, and Enjoy His Property Is Violative of The Constitutional Guarantee of Due Process.

D. The Agreement In Its Inception Was Subject To Constitutional Limitations Upon The Power of The Courts to Enforce It.

E. The Issue Here Presented Has Never Been Decided By This Court.

II. A Restriction Against the Use of Land by Members of Racial Minorities is Contrary to Public Policy of the United States.

ARGUMENT

I

Judicial Enforcement of the Agreement in Question is Violative of the Constitution and Laws of United States.

A. The Right of a Citizen to Occupy, Use and Enjoy His Property is Guaranteed by the Constitution and Laws of the United States.

Petitioners were and still are the owners in fee simple of the premises in question. The decree complained of deprives them of their right to occupy, use and enjoy their property.

The significant protective bases of the rights thus denied these petitioners are Article IV, Section 2, and the Fifth and Fourteenth Amendments of the Constitution of the United States, and Congressional legislation enacted pursuant thereto.

Whether privileges inherent in state or federal citizenship,[1] they are guaranteed safety from attack by state governments.[2]

B. The State, Through the Courts Below, Has Been the Effective Agent in Depriving Petitioners of Their Property, and the Exercise of Their Constitutionally Protected Rights Therein.

When, as here, a State court enforces a racial covenant, it is the action of the State, and not the action of individ-

[1] See *Ward* v. *Maryland*, 12 Wall. 418, 430; *The Slaughter House* cases, 16 Wall. 36.

[2] *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans* (C. C. A. 4), 37 F. (2d) 712, aff'd 281 U. S. 704.

uals, which deprives the Negro occupant of his right to enjoy his property.

The creation, modification and destruction of rights in property are controlled, not by individual action itself, but by the legal consequences which the State attaches to it. If a Negro is privately persuaded to refrain from occupying or purchasing property by reason of the fact that such a covenant exists, or if each party to the restrictive agreement, by reason of the restriction or otherwise, refuses to sell to a Negro, it is the action of the parties which effectively keeps him out. The same is true as to other private sanctions which they may be able to apply without resort to governmental forces.

But when private sanctions are ineffective to compel obedience to the covenant, and it is necessary to appeal to the courts for its enforcement, individual action ceases and governmental action begins. It is obvious that in a situation where, as here, a Negro purchases and enters into the possession of property upon which there is a racial restriction, he has lost nothing and has been deprived of nothing, by reason merely of the making of the restrictive agreement or the private compulsions of the parties thereto; this is best evidenced by the fact that petitioners are still in occupancy and that the proponents of the covenant find it necessary to go into court to oust them. But when the Court commands him to remove from the premises, an arm of the State government has effected a deprivation.

The decree has all the force of a statute. It has behind it the sovereign power. It is not the respondent, but the sovereignty, speaking through the Court that has issued a mandate to the petitioners enjoining them from occupying, using or enjoying their property.

C. Action by a State, Through Its Judiciary, Prohibiting or Impairing, on Account of Race or Color the Right of a Person to Use, Occupy and Enjoy His Property Is Violative of the Constitutional Guarantee of Due Process.

In *Buchanan* v. *Warley*,[3] this Court firmly established that there is a general right afforded all persons alike by the constitutional guaranty of due process, to use, occupy and enjoy real property without restriction by state action predicated upon race or color. In that case, the Court was faced with an ordinance of the City of Louisville, Kentucky, providing that colored persons could not occupy houses in blocks where the greater number of houses were occupied by white persons, and which contained the same prohibitions as to white persons in blocks where the greater number of houses were occupied by colored persons. Buchanan, the plaintiff, brought an action against Warley, a Negro, for the specific performance of a contract for the sale of the former's lot to the latter. Warley defended upon a provision in his contract excusing him from performance in the event that he should not have, under the laws of the state and city, the right to occupy the property, and contended that the ordinance prevented his occupancy of the subject matter of the contract. It was held, however, that the ordinance was unconstitutional as violative of the due process clause of the Fourteenth Amendment. The Court said:

> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? * * *"[4]

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[3] 245 U. S. 60.
[4] 245 U. S. 75.

"Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. Civil Rights Cases, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color. • • •[5]

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing State interference with property rights except by due process of law. • • •"[6]

In *Harmon* v. *Tyler*,[7] this Court was again faced with an attempt to accomplish substantially the same end by an ordinance prohibiting the sale or lease of property to Negroes in any "community or portion of the city • • • except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." This ordinance likewise was held to be invalid. Still later, legislation effecting a residential segregation predicated upon the intermarriage interdiction was held by this Court to be bad.[8] Substantially all of the State and lower Federal Courts since considering the constitu-

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[5] 245 U. S. 78-79.
[6] 245 U. S. 82.
[7] 273 U. S. 668.
[8] *Deans* v. *City of Richmond*, 281 U. S. 704.

tional validity of such legislative enactments have reached the same conclusion.[9]

For the reasons considered in *Buchanan* v. *Warley*, it would have been beyond the legislative power of the State to have enacted a law seeking the accomplishment of the end sought to be attained by the covenant here involved, or by a law providing that a covenant in the precise terms of that involved in the present case should be enforceable in its courts. It is inconceivable that, so long as the legislature refrains from passing such a law, a State court may, by its decree, compel the specific observance of such covenants and thus afford governmental sanction to a device which it was not within the competency of its legislative branch to authorize. Yet the immediate consequence of the decree now under consideration is to bring about that which the legislative and executive branches of the State are powerless to accomplish.

It is clear that such property rights as are protected by the constitutional guaranty of due process against impairment by the legislature are equally protected against impairment by the judiciary. It is now established that the prohibitions of the Fourteenth Amendment apply to all conceivable forms of State action, including that by its courts.[10] Such action is found when a court predicates its

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[9] *Irvine* v. *City of Clifton Forge*, 124 Va. 781, 97 S. E. 310; *Glover* v. *City of Atlanta*, 148 Ga. 285, 96 S. E. 562; *Jackson* v. *State*, 132 Md. 311, 103 A. 910; *Bowen* v. *City of Atlanta*, 159 Ga. 145, 125 S. E. 199; *Clinard* v. *City of Winston-Salem*, 217 N. C. 119, 6 S. E. 2d 867; *Allen* v. *Oklahoma City*, 175 Okla. 421, 52 P. 2d 1054; and see the cases cited, *supra*. It will be noted that in the *Allen* case, the ordinance was sought to be aided by an exercise of the executive power.

[10] *Ex Parte Virginia*, 100 U. S. 339; *Virginia* v. *Rives*, 100 U. S. 313; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Mooney* v. *Holohan*, 294 U. S. 103.

judgment upon a rule of substantive law developed in the common law, or judge-made law, of a State. Such a rule, so made and applied, is as much the product of State action and is as much subject to the same tests of validity, as if made by that other form of State action, enactment by the legislature. This Court has had frequent occasion to apply this principle. Thus, where a State court grants an injunction against peaceful picketing on the ground that such conduct is forbidden by the common law of the State, its action infringes the Fourteenth Amendment to the same extent as would a statute in similar provision which abridges the freedom of speech which the Fourteenth Amendment commands all States to respect.[11] Likewise, where an individual is convicted in the court of a State of inciting a breach of the peace, a criminal offense under the judge-made law of the State, its action may be condemned on the same grounds.[12] In similar fashion, the constitutional guaranties of free speech may be impinged upon by a State court judgment inflicting a contempt sentence under its version of the common law of the State with respect to punishable contempts of court.[13] And, where a judgment of a State court accomplishes a taking of private property without just compensation, the State has produced a result forbidden by the due process clause.[14] The large body of cases holding that the State has acted where its courts have given effect to a rule of procedure held by it to be a part of the common law of the State, but in effect bringing about a denial of constitutional rights, also serves to emphasize the role of the court as an arm of the State

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[11] *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769.

[12] *Cantwell* v. *Connecticut*, 310 U. S. 296.

[13] *Bridges* v. *California*, 314 U. S. 252.

[14] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226.

and the consequent production of an unconstitutional result.[15]

The mere fact that in *Buchanan* v. *Warley*, the forbidden state action was initiated by the legislative department, while, in the instant case, the action was initially individual in character, makes no difference once the judicial arm of the State has acted. There can be no difference between State action predicated upon prior individual action and that which is not predicated thereon—the Fourteenth Amendment prohibits both. When the Court acts, it action is entirely independent of that of the litigants, and where private action ceases and court action commences, the permission of the one ends and the prohibition of the other begins.

D. The Agreement in its Inception was Subject to Constitutional Limitations Upon the Power of the Courts to Enforce it.

The Supreme Court of Michigan erroneously assumed that when private individuals enter into a restrictive agreement, the Court is obligated to enforce the same. But the courts cannot avoid responsibility under the Fourteenth Amendment by the "convenient apologetics" of an obligation which they cannot constitutionally discharge. There is no absolute freedom of contract in the sense that judicial enforcement of an agreement is automatically forthcoming. The right to contract is subject to a variety of restrictions, of which the usury laws, gambling laws, Sunday laws, the Sherman Anti-Trust Act, peonage sections of the Criminal Code, the National Labor Relations Act and prevention of

[15] *Twining* v. *New Jersey*, 211 U. S. 78; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673; *Powell* v. *Alabama*, 287 U. S. 45; *Moore* v. *Dempsey*, 261 U. S. 86; *Scott* v. *McNeal*, 154 U. S. 34.

unfair competition by the Federal Trade Commission, are illustrative. It is likewise clear that where, by reason of constitutional prohibitions, a court is prevented from enforcing an agreement privately made, there can be no claim that there has been an unjustified interference with liberty of contract. In such a case every individually-made contract from its inception is subject to the infirmity that judicial enforcement cannot be obtained if, so to enforce it, a violation of constitutionally protected rights will follow.

The right of an individual to make a contract is subject to the paramount authority vested in government by the Federal Constitution. Thus, in *Norman* v. *Baltimore & O. R. Co.*,[16] it was held that the joint resolution abrogating the Gold Clause stipulation in money contract obligations could be applied to pre-existing private agreements, since all individual agreements are made subject to the exercise of the Federal power to regulate the value of money.

Again, in *Home Building and Loan Association* v. *Blaisdell*,[17] it was held that a state statute might, in spite of the prohibitions in the Federal Constitution against state impairment of the obligations of a contract, be applied in such manner that the previously made contract would be impaired, since all contracts made between individuals are subject to the paramount authority of the State to enact laws validly within its police power.

It is the duty of the courts to enforce contracts so long as the court may do so consistently with the supreme law of the land. If, however, a court lends its aid to the enforcement of a segregation restriction, with the result that a Negro is deprived of his constitutional right to occupy

[16] 294 U. S. 240.
[17] 290 U. S. 398.

property, there is an infringement of the constitutional guaranties of due process within the holding of this Court in *Buchanan* v. *Warley*.

The contract involved in this case must be understood as having been made subject to existing constitutional limitations upon the authority of the state to enforce it, and although the declination of the Court to enforce the agreement effectively prevents it from ripening in the manner desired by the contracting parties, its action could not be considered as the denial to them of any constitutionally protected rights.

E. The Issue Here Presented Has Never Been Decided by This Court.

Judicial enforceability of racial restrictive covenants has frequently been assumed to follow from the decision of this Court in the case of *Corrigan* v. *Buckley*.[18] A reexamination of that case makes it apparent that the issue here presented was neither presented nor decided there.

About 30 white persons, including the plaintiff and defendant Corrigan, who were the owners of 25 parcels of land, executed and recorded an indenture in which they mutually covenanted that no part of the properties covered would ever be sold to or occupied by Negroes. A year later, defendant Corrigan entered into a contract to sell to defendant Curtis, a Negro, a house and lot situated within the restricted area. Plaintiff thereupon brought suit to enjoin the sale to and occupancy by defendant Curtis. Both defendants moved to dismiss the bill upon grounds which did

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[18] 55 App. D. C. 30, 299 Fed. 899; appeal denied 271 U. S. 323.

not question the constitutional propriety of judicial enforcement of the covenant.[19] The motions were denied and an appeal to the Court of Appeals for the District of Columbia[20] taken, where the issue was stated as follows:

> "* * * The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by Negroes."

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[19] Defendant Corrigan moved to dismiss the bill on the grounds that the "indenture or covenant made the basis of said bill" is (1) "void in that the same is contrary to and in violation of the Constitution of the United States," and (2) "is void in that the same is contrary to public policy." Defendant Curtis moved to dismiss the bill on the grounds that it appeared therein that the indenture or covenant "is void, in that it attempted to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction (and denies them) the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments." From the opinion of the Supreme Court of the United States, 271 U. S. 328-329.

[20] 55 App. D. C. 30, 299 Fed. 899.

Following an affirmance of the decree, an appeal to this Court[21] was taken under the provisions of Section 250 of the Judicial Code. This Court stated the issue as follows:[22]

> "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. * * *"

In dismissing the appeal for want of jurisdiction, this Court said:[23]

> "And, while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it *was not raised* by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. * * *
>
> "Hence, without a consideration of these questions, the appeal must be, and is, dismissed for want of jurisdiction." (Italics supplied.)

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[21] 271 U. S. 323.
[22] 271 U. S. 329-330.
[23] 271 U. S. 331-332.

It must be concluded, therefore, that the constitutionality of judicial enforcement of such an agreement was not decided in *Corrigan* v. *Buckley*.[24]

While the *Corrigan* decision contains an intimation by way of dictum that no constitutional question is presented

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[24] Close examination of the opinion reveals that the Court actually decided only four propositions:

(1) That since the Fourteenth Amendment, by its terms, directs its prohibitions only to state action, it was not violated by the *creation* of the covenant. Thus, defendants' motions to dismiss on this ground did not raise any constitutional question, and therefore afforded no basis for an appellate review in the Supreme Court as a matter of right.

(2) That Sections 1977 and 1978 (U. S. C., secs. 41 and 42) of the Revised Statutes neither render the covenant void nor raise any substantial federal question, but merely give all citizens of the United States the same right in every state and territory to make and enforce contracts, to purchase, lease and hold real property, etc., as is enjoyed by white citizens, and this, only against impairment by state action. Hence, individual action consisting in entering into a restrictive agreement is not forbidden.

(3) That the contention that the covenant was against public policy, and therefore void, is purely a question of local law, and so could not afford a substantial basis for an appeal to the Supreme Court.

(4) That the objection that the entry of the decrees in the lower courts enforcing the covenant constituted state action in violation of the Fifth and Fourteenth Amendments, was not raised in the petition for appeal or by assignment of error either in the Court of Appeals or in the Supreme Court, and was therefore not before the Court for decision.

In recognition of this, the Supreme Court of Michigan in the instant case considered *Corrigan* v. *Buckley* inapplicable, saying:

> "It is argued that the restriction in question violates the 14th Amendment to the Constitution of the United States. Appellees say that this argument was answered in Corrigan v. Buckley, 271 U. S. 323. We do not so read the Corrigan case, but rather that the decision there turned on the inapplicability of the equal protection clause of the 14th Amendment to the District of Columbia, and that the appeal was dismissed for want of jurisdiction. 316 Mich. 614. (The certified copy of the opinion and the opinion as reported at 25 N. W. (2d) 638, and as filed reads as quoted. In the Advance Michigan reports, the second sentence reads, 'We so read the *Corrigan Case*, although that decision partly turned . . . . .')."

by the facts of that case, it is to be remembered that this Court was not then committed to the doctrine that common law determinations of courts can constitute reviewable violations of the due process clause. But the Court is now committed to that doctrine.[25]

This Court has additional reason for reinterpreting its decision in the *Corrigan* case.

> "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. *This is particularly true when the decision believed erroneous is the application of a constitutional principle* rather than an interpretation of the Constitution to extract the principle itself." (Emphasis supplied.)[26]

II

A Restriction Against the Use of Land by Members of Racial Minorities Is Contrary to Public Policy of the United States.

A. The Public Policy of the United States.

Fundamental national policies expressed in the Constitution and laws of the United States are offended by the restrictive agreement involved in the present case. The constitutionality of judicial enforcement of such restrictions is challenged in another section of this brief. But it is clear that even before the issue of constitutionality is

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[25] Argument, Part IC.

[26] *Smith* v. *Allwright*, 321 U. S. 649, 665, 666.

reached, the constitutional prohibition against legislation must at least reflect national policy against the abuse of private power to accomplish the same result.

The Thirteenth Amendment to the Constitution was adopted to abolish slavery and the Fourteenth and Fifteenth Amendments to abolish the badges of servitude which remained in the treatment of the recently freed slave. These were the first steps in creating a public policy, and were so recognized by this Court in 1872 when the memory of the struggle for the adoption of the amendments was still alive.

> "... no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[27]

> "... The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."[28]

At the close of the Second World War, which was so largely waged for the principles of racial and religious equality as enunciated in the Atlantic Charter, the United

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[27] *Slaughter-House Cases*, 16 Wall. 36, 71.
[28] *Strauder v. West Virginia*, 100 U. S. 303, 308.

States solemnly dedicated itself, with the other members of the United Nations, to promote universal respect for the observance of "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." (United Nations Charter, Articles 55 and 56.) The preamble of the Charter of the United Nations contains the following statement:

> "We, the people of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors . . ."

Such a dedication by treaty on the part of the United States, ratified by the Senate, has deepened and reinforced the previous national public policy against racial and religious discrimination at law.

Ample precedent for the adoption of the view here advocated is supplied by the recent decision of a Canadian Court,[29] which involved an application of the owner of certain registered lands to have declared as invalid a restrictive covenant assumed by him when he purchased these lands, and which he agreed to exact from his assigns. The restriction was:

> Land shall not be sold to Jews or persons of objectionable nationality.

The Court, after considering numerous relevant sources (including the San Francisco Charter, speeches of Presi-

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[29] *In re Drummond Wren* (1945), 4 D. L. R. 674.

dent Roosevelt, Winston Churchill, and General Charles de Gaulle, and the Constitution of the Union of Soviet Socialist Republics), held that the restriction was void, saying:

> "How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.
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> "Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While

courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

"That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require inpovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."

In their effort to rise from slavery to equality with their fellow men, colored citizens are everywhere met by the effort to keep them down, and to deny them that equal opportunity which the Constitution secures to all. If they can be forbidden to live on their own land by an instrumentality of the government, they can be forbidden to work at their own trade. Yet this Court has most recently extended its protection to Negro workers against use of

government power to exclude them from their trade.[30] Without protection against such judicial action to implement private agreements, the prejudice, against which the war amendments were framed to defend the colored people, triumphs over them, and the amendments themselves become dead letters—as do the solemn obligations of the United Nations Charter.

B. The Demonstrable Consequences of Racial Zoning by Court Enforcement of Restrictive Covenants are Gravely Injurious to the Public Welfare.

Residential segregation, which is sought to be maintained by court enforcement of the race restrictive covenant before this Court, "has kept the Negro occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and plague spots for race exploitation, friction and riots!" *Report of the Committee on Negro Housing of the President, Conference on Home Building*, Vol. VI, pp. 45, 46 (1932).

The extent of overcrowding resulting from the enforced segregation of Negro residents is daily increasing. The United States Census of 1940 examines the characteristics of 19 million urban dwellings. The census classifies a dwelling as overcrowded if it is occupied by more than 1½ persons per room. On this basis 8 percent of the units occupied by whites in the nation are classified in the 1940 census as overcrowded, while 25 percent of those occupied by non-whites are so classified. In Baltimore, Maryland, Negroes comprise 20 percent of the population yet are

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[30] See *Tunstall* v. *Brotherhood of Firemen and Engineers*, 323 U. S. 210, and *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192.

constricted in 2 percent of the residential areas. In the Negro occupied second and third wards of Chicago, the population density is 90,000 per square mile, exceeding even the notorious overcrowding of Calcutta.

Census figures show that 8 percent of the non-white residents of the Detroit-Willow Run Area lived at a density in excess of 1½ persons per room, while only 2.3 percent of the white residents were classified as overcrowded in the census of 1940.[31]

The critical lack of housing facilities in Michigan's non-white population is emphasized by the following quotation from another census study of the Detroit Metropolitan District.

> "Vacancy rates were generally lower in Negro sections than in white sections. The gross vacancy rate among dwelling units for Negro occupancy was 0.4 percent and among those for white occupancy 0.8 percent.
>
> "Habitable vacancies represented about seven eighths of the unoccupied dwellings intended for white occupants and one half of those for Negro occupants.
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> "Crowded dwelling units—those housing more than 1½ persons a room—made up 1.3 percent of the dwellings in white neighborhoods and 7.4 percent of the dwellings in Negro neighborhoods. These units [Negro housing] had only one percent of all the entire area but were occupied by three percent of its population." (U. S. Department of Commerce, Bureau of Census, Special Survey H. O. No. 143, August 23, 1944.)

[31] U. S. Dept. of Commerce, Bureau of Census, Series C. A. 3, No. 9, Oct. 1, 1944.

The overcrowding of the entire community during the period from 1940 to 1944 can be emphasized by the growth of the Detroit Metropolitan District's population from 2,295,867 in 1940 to 2,455,035 in 1944. During the same period the non-white population in the Metropolitan area increased from 171,877 to 250,195 (U. S. Department of Commerce, Bureau of Census, Population Series C. A. 3 No. 9, October 1, 1944).

According to the Bureau of Census, the non-white population of Detroit itself increased from 150,790 in 1940 to 213,345 in June of 1944, a percentage increase of 41.5 percent.

The City of Detroit Interracial Committee has recently completed a study of its work for the calendar year 1946, released on March 17, 1947, based upon which it has issued a statement of policy from which the following quotation is taken:

"*Housing*

Every informed person in Detroit knows of the acute housing shortage existing not only locally but throughout the country. This shortage, which affects all people, is felt especially by veterans and the younger married group. The already serious problem is further complicated for the Negro share of the population, however, by the existence of certain obstacles to suitable housing over and above those encountered by other citizens. While other minority groups may have special problems, it is against Negroes that the principal discriminatory practices are most prevalent.

"The City of Detroit Interracial Committee feels impelled to point out certain of these practices and to state what it believes to be sound principles in relation thereto.

"It is a fundamental principle in this country that all governmental activities and services and all private business should be conducted without discrimination on account of color, national origin or religious belief. The facts are, however, that this principle is constantly disregarded in the matter of housing by both government and private individuals.

"The following discriminatory practices in residential housing activities have been employed in Detroit and elsewhere:

1. Covenants restricting occupancy based on race are imposed on residential property by developers or groups of owners.

2. In the absence of such covenants, owners or occupiers of residential property by threats or acts of violence attempt to prevent occupancy of homes in their vicinity by persons of another race, creed or color.

3. Lending agencies reject legitimate loans because the borrower is of a race other than that established as the pattern of the neighborhood.

4. Real estate dealers, by agreement and a 'Code of Ethics', attempt to prevent occupancy by persons because of race, color or creed, and government agencies approve such practices.

5. In the redevelopment of blighted areas and in providing public housing, government agencies have recognized, approved and fortified such discriminatory practices.

"The chief sufferers from those practices are the Negro people. Housing for Negroes is utterly inadequate, Negroes are forced to live in overcrowded, substandard houses, and these conditions foster disease, delinquency and civic irresponsibility. A free market in housing and in land for housing does not exist. The home building industry and the dealers in homes seem to assume that the Negro popula-

tion can be housed in dwellings abandoned by whites, which is clearly not the case. They appear to disregard the fact that many Negroes are financially able to pay for much better homes than are generally available to them and the fact that the 'hand-me-down' houses of whites are not sufficient in number to fill the demand for Negro housing. Opportunities for expansion to vacant land are almost completely shut off to Negroes. The restrictive practices referred to above apply most effectively to vacant or thinly developed areas of the City and suburbs."

The Detroit Housing Commission arrived at the conclusion that the situation within the City of Detroit is such that the only solution for the Negro housing problem is in the opening of new unrestricted areas.[32]

The creation and growth of Negro slum areas with resulting high mortality, disease, delinquency and other social evils, have been due in large measure to the existence of restrictive covenants against Negroes which have prevented the normal development of Negro community life. As stated by Mr. James M. Haswell, Staff Writer for the Detroit Free Press on March 17, 1945 in a special feature article dealing with the Detroit housing situation:

"No substantial migration possible under present restriction patterns.

"Nobody knows how many hundreds of restrictive covenants and neighborhood agreements there are in Detroit binding property owners not to permit Negro occupancy. The number has increased greatly in response to the Negro search for new residence areas. There are said to be 150 associations of property owners promoting these agreements."

To the same effect is the comment of the Commissioner, Federal Public Housing Authority, Philip M. Klutznick, in

[32] Detroit Housing. Official Report to Mayor, December 12, 1944.

his article, *Public Housing Charts Its Course*, published in *Survey Graphic* for January, 1945:

> "But the minority housing problem is not one of buildings alone. More than anything else it is a matter of finding space in which to put the buildings. Large groups of these people are being forced to live in tight pockets of slum areas where they increase at their own peril; they are denied the opportunity to spread out into new areas in the search for decent living.
>
> "The opening of new areas of living to all minority groups is a community problem. And it is one of national concern."

This is not a new situation, but it is becoming more aggravated from year to year. One of the most discerning writers in this field clearly pointed out what was happening and its social dangers:

> "Congestion comes about largely from conditions over which the Negroes have little control. They are crowded into segregated neighborhoods, are obliged to go there and nowhere else, and are subjected to vicious exploitation. Overcrowding saps the vitality and the moral vigor of those in the dense neighborhoods. The environment then, rather than hereditary traits, is a strong factor in increasing death-rates and moral disorders. Since the cost of sickness, death, immorality and crime is in part borne by municipal appropriations to hospitals, jails and courts, and in part by employers' losses through absence of employees, the entire community pays for conditions from which the exploiters of real estate profit."[33]

It is also widely recognized that these anti-social covenants are not characteristically the spontaneous product of

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[33] Woofter, *Negro Problem In Cities* (1938), at page 95.

the community will but rather result from the pressures and calculated action of those who seek to exploit for their own gain residential segregation and its consequences.

> "The riots of Chicago were preceded by the organization of a number of these associations (neighborhood protective associations); and an excellent report on their workings is to be found in *The Negro in Chicago*, the report of the Chicago Race Commission. The endeavor of such organizations is to pledge the property holders of the neighborhood not to sell or rent to Negroes, and to use all the possible pressures of boycott and ostracism in the endeavor to hold the status of the area. They often endeavor to bring pressure from banks against loans on Negro property in the neighborhood, and are sometimes successful in this.
>
> "The danger in such associations lies in the tendency of unruly members to become inflamed and to resort to acts of violence. Although they are a usual phenomenon when neighborhoods are changing from white to Negro in northern cities, no record was found in this study where such an association had been successful in stopping the spread of a Negro neighborhood. The net results seem to have been a slight retardation in the rate of spread and the creation of a considerable amount of bitterness in the community."[34] Cf. Embree, *Brown Americans* (1943) at page 34 reporting 175 such organizations in Chicago alone.

The same thesis with reference to the City of Detroit was recently elaborated by Dr. Alfred M. Lee, Professor of Sociology at Wayne University:

> "Emphasizing overcrowding and poor housing as one of the major causes of racial disturbances, Lee declared that in his opinion real estate dealers and

[34] Woofter, *op. cit.*, p. 73.

agents have been doing more to stir up racial antagonisms in Detroit than any other single group.

"'These men (real estate dealers),' Lee said, 'Are the ones who organize, promote and maintain restrictive covenants and discriminatory organizations. I am convinced that once it is possible to break the legality of these covenants, a great deal of our troubles will disappear.'" As reported in *The Michigan Chronicle* for May 9, 1945.

Other significant analyses of racial conflicts emphasize the evils of segregation and its contribution to tension and strife.

"But they [the Negroes] are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice." Myrdal, *An American Dilemma*, (1944) vol. 1, page 625.

"The Detroit riots of 1943 supplied dramatic evidence: rioting occurred in sections where white and Negro citizens faced each other across a color line, but not in sections where the two groups lived side by side." Good Neighbors, *Architectural Forum*, January 1946.

The dangers to society which are inherent in the restriction of members of minority groups to overcrowded slum areas are so great and are so well recognized that a court of equity, charged with maintaining the public interest, should not, through the exercise of the power given to it by the people, intensify so dangerous a situation. Therefore, in the light of public interest, the court below erred in granting the plaintiff's petition and ordering the defendants to move from their homes.

Conclusion

In considering this question, it is immaterial that the restrictive covenants sought to be enforced are directed against Negroes. If valid for excluding Negroes, they would be equally valid and enforceable by injunction if directed against Jews, Catholics, Chinese, Mexicans or any other identifiable group. One might even envisage a similar discrimination against persons belonging to a political party--Republicans or Democrats—depending upon the prevailing opinion in the area.

Perhaps perpetual covenants against racial or religious minorities might not have been oppressive in frontier days, when there was a surplus of unappropriated land; but frontier days in America have passed. All the land is appropriated and owned. White people have the bulk of the land. Will they try to make provision for the irresistible demands of an expanding population, or will they blindly permit private individuals whose social vision is no broader than their personal prejudices to constrict the natural expansion of residential area until we reach the point where the irresistible force meets the immovable body?

For the reasons set forth above, it is respectfully requested that this Court issue a writ of certiorari as prayed for in the accompanying petition.

Respectfully submitted,

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